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THE RECORD

OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

VOLUME THREE

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THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

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Association Activities

FOUR PROPOSED amendments to the Constitution of the United States were approved by the Association at its Stated Meeting on December 9. The proposals were sponsored by the Special Committee on the Federal Courts, Edwin A. Falk, Chairman.

The amendments which were approved would limit the number of justices of the Supreme Court to nine, set a compulsory retirement age at seventy-five years, prohibit members of the Supreme Court from being eligible for the office of President or of Vice President, and write into Article III, Section 2 of the Constitution a specific provision for guaranteeing appellate jurisdiction for the Supreme Court in all cases arising under the Constitution.

The Special Committee, now that its proposals are approved, will present them for consideration to the American Bar Association at its midwinter meeting in February.

AT THE Stated Meeting on December 9 Judge Samuel I. Rosenman, chairman of the Special Committee on Public and Bar Relations, reported that his Committee, acting pursuant to the direction of the Executive Committee, was actively engaged in

trying to secure the enactment by the Congress of appropriate amendments to the tax laws to extend the tax benefits of pension plans, or some similar means of providing retirement, to all persons not covered by the existing pension trust provisions of the internal revenue code.

The amendments have been worked out by the Committee on Taxation and are noted by the Committee at page six in the report which was mailed to all members of the Association. A full explanation of the plan recommended may be found in the full report of the Taxation Committee, which is available upon application to the Executive Secretary. The Special Committee on Public and Bar Relations, in furthering this program, will enlist the support of professional and other groups.

THE COMMITTEE on Law Reform, Barent Ten Eyck, Chairman, will seek to have introduced into the Legislature the following measures, all of which were presented to the last General Assembly:

An Act to Amend the Civil Practice Act in Relation to Depositions and Discovery.

An Act to Amend the Real Property Law and the Personal Property Law in Relation to Future Estates in Real or Personal Property and the Rule Against Perpetuities.

An Act to Amend the General Construction Law in Relation to Definition of Terms "Bond and Mortgage" and "Note and Mortgage."

An Act to Amend the Public Officers Law in Relation to Prohibiting the Giving of Advice Concerning Retention and Employment of Attorneys at Law.

In addition, the Committee will attempt to secure the introduction of the Association's bill which would liberalize the divorce law of the State. This proposal was approved by the Association in 1945. A second measure which the Committee will attempt to have introduced is the proposed amendment to the Constitution of the State of New York, which would prohibit

judges from standing for office other than judicial office without first resigning from the bench. Another measure which will be introduced and which was approved by the Association this year is the bill to amend the Workmen's Compensation Law to provide that a co-employee or an employer may be held liable for wilful assault notwithstanding the present provisions of the Workmen's Compensation Law.

IN THIS issue of THE RECORD the Committee on Medical Jurisprudence is publishing a report on the Medico-Legal Aspects of the Control of Alcoholism. The report is the work of Dr. Lyman C. Duryea, the medical director of The Research Council on Problems of Alcohol. Dr. Duryea prepared the report as a contribution to the Committee's study of the legal problems of alcoholism. In this connection the Committee has had the co-operation not only of the Council but also of the New York County Medical Society and of the New York Academy of Medicine.

ROLLIN BROWNE, chairman of the Committee on Taxation, and five members of that Committee appeared before the Committee on Ways and Means in Washington to present for the consideration of the Congress their report, a summary of which has been mailed to the members of the Association.

The report contains the twenty-two specific recommendations for changes in the Federal Income, Estate and Gift Tax Laws which the Committee had recommended in 1946 and, in addition, recommends the adoption of twenty-three additional amendments. The full report with the studies supporting these recommendations may be had by members upon application to the Executive Secretary.

At the meeting with the Ways and Means Committee a full morning session was devoted to an explanation and discussion of the Taxation Committee's recommendations. It has also been arranged to have a full day's conference early in January with

representatives of the Treasury and Joint Committee staffs.

In addition to its work in connection with its report, the Committee on Taxation has also studied eighty-seven bills affecting taxation which were introduced in the New York Legislature. Of these the Committee was able to give its full approval to twenty-one, partially approve three, and completely disapprove eleven and disapprove three more as to form.

THE COMMITTEE on Foreign Law, John N. Hazard, Chairman, is continuing its study of Section 344a of the New York Civil Practice Act, which deals with proof of foreign law. The Committee has had the assistance of the Committee on Law Reform. A preliminary report on this subject was published by the Committee in THE RECORD for March, 1947. A final report is being prepared for presentation to the Association at a future Stated Meeting. In addition, the Committee is also considering legislation which would provide for uniformity in negotiable instruments and other documents employed in foreign trade.

ON JANUARY 23 the Association will hold a reception for the members of the New York State Bar Association who will be attending the Annual Meeting of that Association. The reception will be held at the House of the Association at five o'clock, and all members of both Associations are urged to be present.

IN APRIL, 1946, the Association at the Stated Meeting adopted a resolution presented by the Committee on the Bill of Rights, which directed that the Association promote legislation requiring disclosure of the originators, officers, financial records, and other pertinent facts of organizations engaged in the public dissemination of materials intended to influence public opinion. At its first meeting this year the Committee on the Bill of Rights, Henry A. Johnston, Chairman, decided it would also press for

state legislation along the same lines. It is understood that the Federal legislation will be presented as a result of the report of the President's Committee on Civil Rights.

GRENVILLE CLARK AND CLARK M. EICHELBERGER, director of the American Association for the United Nations, will hold a joint discussion on February 7 of problems of world government. The discussion will be preceded by a buffet luncheon for members of the Association in the Reception Hall of the House of the Association. Notices of the meeting will be mailed to the membership. The program is under the sponsorship of the Committee on International Law, of which John E. Lockwood is Chairman.

ON DECEMBER 16 Adolf A. Berle, Jr., former Assistant Secretary of State, spoke before a large audience on the subject of The Marshall Plan. The lecture was one of a series sponsored by the Committee on Post-Admission Legal Education, of which Cloyd Laporte is the chairman.

The third program in this series will be a joint discussion on January 13 by Federal Judge Charles E. Wyzanski and Justice Ferdinand Pecora on Standards for Congressional Investigations. The discussion will be preceded by a buffet supper at 6:15.

PLANS FOR the 1948 exhibition of photographs by members of the Association are being formulated by Alexander Lindy, the chairman of a subcommittee of the Committee on Art. Last year the exhibition was a most pleasant occasion, and it is expected this year that the number of exhibitors will exceed last year's.

IN NOVEMBER the Entertainment Committee sent to the membership a questionnaire as a first step toward the possible organization of an Association orchestra. A great many members

have returned the questionnaire indicating their interest in this project. The Committee will soon announce whether on the basis of the questionnaires an orchestra can be organized.

Any member who still wishes to express his interest in joining the orchestra if one is organized may do so by addressing a letter to the chairman of the Entertainment Committee, 42 West 44th Street.

THE SECRETARY'S office has announced that the Memorial Book this year will be printed separately from the Year Book. The Memorial Book, which will have a more attractive and expensive format, will be sent without charge to those members who request it. Copies can be reserved only for members who reply before January 30. A list of memorials to be included was mailed to the membership.

PRECEDING the Stated Meeting on January 20 two important and interesting films will be shown in the Meeting Hall of the House of the Association at 5:00 P.M. All members of the bar are invited to attend and members of the Association may bring guests.

One of the films is the Russian documentary sound film with English narration on The Nuremberg Trials. The film is the only full-length film on the trials. Motion picture critics have indicated that the picture is effective and impressive.

The second film to be shown is an English picture which records the devastation of the war in the Inns of Court in London. Those who have seen the film recommend it highly.

The Calendar of the Association for January

(As of December 23, 1947)

January 5	Dinner Meeting of Committee on Professional Ethics Meeting of Subcommittee of Committee on Trade-Marks and Unfair Competition
January 6	Twelfth-Night Festival, 8:15 P.M.
January 7	Dinner Meeting of Executive Committee Meeting of Section on Wills, Trusts and Estates
January 8	Dinner Meeting of Committee on the Domestic Relations Court Meeting of Committee on Entertainment Dinner Meeting of Committee on Law Reform
January 12	Meeting of Section on Taxation
January 13	"Standards for Congressional Investigations." Joint Discussion and Lecture by The Honorable Ferdinand Pecora, Justice of the Supreme Court of the State of New York, and The Honorable Charles E. Wyzanski, United States District Judge, District of Massachusetts. Buffet Supper, 6:15 P.M. Meeting of Committee on State Legislation
January 14	Dinner Meeting of Committee on Administrative Law Meeting of Committee on Copyright Meeting of Section on Labor Law
January 15	Meeting of Section on Corporations Dinner Meeting of Committee on Courts of Superior Jurisdiction Meeting of Committee on Foreign Law
January 16	Meeting of Section on State and Federal Procedure
January 19	Dinner Meeting of Committee on Insurance Law Dinner Meeting of Committee on International Law Meeting of Committee on Trade-Marks and Unfair Competition

January 20	*Stated Meeting of Association and Buffet Supper–6:15 P.M.* Meeting of Committee on State Legislation
January 21	Meeting of Committee on Admissions Meeting of Committee on Public and Bar Relations
January 23	Annual Meeting of New York State Bar Association
January 24	Annual Meeting of New York State Bar Association
January 26	Meeting of Library Committee Round-Table Conference preceded by buffet supper for members of the Association at 6:15 P.M.
January 27	Dinner Meeting of Committee on Bankruptcy Meeting of Committee on State Legislation
January 28	Meeting of House Committee Meeting of Section on Trials and Appeals
January 29	Dinner Meeting of Committee on Medical Jurisprudence
January 30	Meeting of Section on Drafting of Legal Instruments

MEMBERSHIP RECORD CARDS

The Secretary calls to the attention of the membership the importance of returning *at once* the completed membership record cards which were mailed on September 15, 1947. The Secretary's office will furnish additional cards to those members who have misplaced the cards sent to them.

It is to be emphasized that these cards will constitute the permanent membership records of the Association. Unnecessary expense can be avoided by cooperating in the completion of these files.

The President's Letter

To the Members of the Association:

I have deliberately avoided letters in the last two issues of THE RECORD because I knew that if I wrote one I must refer to the progress of the building program. That has been a subject to avoid. The delays would have been heartbreaking but for the patience of the membership. I will not attempt to explain them. No man can explain what he does not understand. And for one of my generation the immobility or, at best, the slow motion of the workingman is not understandable. I will give you only the present promises and let you note the extent to which they are fulfilled.

The new office space over the Meeting Hall will be completed by the first of January except for the painting. The fire escapes will probably be finished at the same time although there is a possibility of further delay. The Reception Hall, Supper Room, Evarts, Carter and Choate Rooms and the toilets will be in final shape by the first of January. The two new elevators will be running by March 15th, God willing and the unions not opposing. The hangings will be up and the new furniture will be in the Supper Room and Reception Hall by the middle of February.

Fortunately most of the obstructive incidents have contained a germ of humor. For instance, on the advice of the Art Committee and interior decorator I asked an appropriation from the Executive Committee to remodel the mantels and book shelves and do a little other work in the Carter and Evarts Rooms. At the meeting the vote for the appropriation was unanimous when taken at six o'clock. During the dinner interval some of the members viewed the premises, imbibing cocktails either before or after or perhaps both. Anyway at nine o'clock they moved to reconsider. The massive mahogany was magnificent. Not one square inch of it should be sacrificed to the purely temporary aesthetics of 1947. Those rooms were good enough for Evarts and Carter

and who were we to change them! There were tears—hot with nostalgia—when the original vote was upheld.

Speaking of tears, I admit that when I first saw the green pillars in the Reception Hall I almost broke down. But these are the tears of yesterday. The minority members of the Executive Committee have been restored to gaiety by Christmas presents of pieces of the mahogany which they loved so well—if only for a night. I myself have come to almost like the green pillars. And I am told that the installation of the hangings and furniture will clinch my approval. I hope that others who may not at first approve everything will be patient and broad-minded.

The utilitarian changes in the building—completed and uncompleted—seem to be satisfactory. It is true that the advantages of new plumbing are not continuously obvious and that fire escapes will be appreciated only if there is a fire—which God grant there will not be. But the better lighting is welcome and it is a blessing to be able to hear in the Meeting Hall—at least most of the time. And I urge you to look at the new quarters for the Librarian and his staff opposite the library reading room—although it might be well to postpone this until February. There have been mistakes, of course, but mistakes can be avoided only by doing nothing. There have been omissions but they were inevitable in the interests of economy and I prophesy that most of them will turn out to be only postponements.

I want to pass along the news that the Committee on Round Table Conferences is justifying its new method of procedure. The two meetings at which Presiding Justice Peck and Judge Medina were guests of honor gave an aggregate of over 250 members thoroughly enjoyable evenings. The procedure is to meet for cocktails, eat a buffet supper at tables in the Reception Hall, remain there for a discussion led by the guest of honor, and then stay on a little longer to drink beer and talk even more informally. A large part of the credit for the success goes to the Presiding Justice who is deeply interested in bringing judges and lawyers closer together socially and in an understanding of their mutual problems. I hope that many of our Judicial Members will turn

out for the Twelfth Night celebration on January 6. This will be in the nature of a housewarming or a Building Committee panning, according to the state of the premises. In either guise, the party should be a success.

The experiment of offering something of interest in the late afternoon prior to a stated meeting will be tried on January 20. At five o'clock there will be a showing of moving pictures of the destruction of the Inns of Court in London and a showing of the Russian documentary film of the Nuremberg Trials. There will be the usual cocktails and buffet supper at 6:15 o'clock. I hope that this will stimulate attendance. The number who came to the December meeting was discouragingly small although the business was interesting and important. Otherwise there has been increased interest in Association activities and more of them.

HARRISON TWEED

December 16, 1947

Cross-Examination—A Judge's Viewpoint

By Bernard L. Shientag

Justice of the Appellate Division of the Supreme Court, First Department

To talk on cross-examination is a rather bold undertaking. However, it was thought that the Bar might be interested to hear how cross-examination has impressed a Judge who, for many years, more than I like to acknowledge, has encountered it in the trial parts and in records on appeal.

Now, cross-examination has been defined rather facetiously as the art of asking the right questions at the right time and in the right manner. Of course, that solves everything. Someone put it negatively that cross-examination is the art of not asking the wrong questions, at the wrong time and in the wrong manner. Strangely enough, there are grains of truth in these definitions. One of the most successful English barristers, Montagu Williams, said that the true art consisted in knowing either when not to cross-examine at all, or the exact place to stop.

THE FALLIBILITY OF HUMAN TESTIMONY

We start with the fundamental conception that a trial, under our procedure, is not a game or a battle of wits but a painstaking, orderly inquiry for the discovery of the truth. "We are not gifted with the power to discern truth with mathematical certitude." We have to deal, therefore, with probabilities. Where the facts are in dispute cases, generally speaking, are proved by human

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Editor's Note: Justice Shientag, a member and former chairman of the Association's Committee on Post-Admission Legal Education, was appointed Justice of the City Court in 1924 and Justice of the Supreme Court in 1930, and to the Appellate Division in 1947. He is the author of The Trial of a Civil Jury Action in New York; Summary Judgment; Moulders of Legal Thought; The Personality of the Judge; and has been a frequent contributor to law reviews. The lecture which is published here was delivered at the House of the Association on November 18, 1947.

testimony. The value of that testimony depends on the honesty of the witness, his means of knowledge, his memory, his intelligence and his impartiality. Every question is relevant which goes to indicate the presence or absence of those qualities or of any of them. The object of cross-examination may be described as threefold: First, to elicit from an adverse witness something in your favor; second, to destroy or weaken the force of what the witness has said against you and, third, to show from the present attitude of the witness or from his past experience that he is unworthy of belief in whole or in part.

Deliberate perjury in civil cases, except possibly in divorce actions, is quite rare. But the fallibility of human testimony, given with the best intentions, has long been recognized. Indeed, some scientists have proposed that a witness should be subjected to psychological tests to detect flaws which would necessarily affect his testimony. The lawyer seeks to discover those flaws, and in exceptional instances to unmask perjury, by the method of cross-examination—the only method for that purpose which our present trial procedure affords. The cross-examiner must, therefore, be something of a psychologist himself. Indeed, I have often wondered why the law schools and the foundations interested in legal research have not made extensive studies into the psychological principles underlying the reliability of testimonial narrative and the art of persuasion. Be that as it may, the successful cross-examiner must be a student of human nature and understand its strength and its weakness. He must know how to handle different types of people.

Science struggles constantly against the imperfections of our sensorial system: the inability of the senses accurately to register impressions. Some idea of our limitations in that regard may be gained when we consider the innumerable new facts revealed by slow motion moving pictures.

Descriptions of what a person sees or hears are in many instances grossly inaccurate and they become increasingly so with the lapse of time between the original experience and the reproduction. Observation may, in the first place, have been faulty

leading to the omission of certain details and the addition of others. There is a tendency for a person to confound what he imagines with what he has seen or heard. When details are forgotten, we try to fill in the gaps with what we remember. Everything that seems reasonable in the light of what we do remember is recalled. A witness may be unconsciously misled by suggestion, sometimes by a sense of his own importance, and give way to unintentional elaboration and exaggeration. Here we have then the frailties of human testimony: faulty or superficial observation, faulty memory, mistaken inferences, prejudice, rationalization and projection, about which much has and could be written.

Moreover, there is the tendency for witnesses to exaggerate the facts favorable to the cause for which they are testifying and to ignore opposing circumstances. That reflects the sense of partisanship of a witness towards the side in whose behalf he is called —a partisanship all the more potent for being for the most part unconscious.

Added to all this is the confusion of those who, as has been well said, are suddenly plunged into a strange environment, that of the court room, where they are expected to conduct themselves in a manner foreign to their custom and under a restraint not conducive either to clear consecutive thought or to free expression.

Baron Bramwell pointed out other powerful psychological factors which are fundamental in good cross-examination but which too often are ignored. He said that "witnesses under cross-examination seem to labor under the notion that the cross-examiner is an opponent to them, that he wants to make them say something they ought not to say, that he is laying traps for them. They forget most commonly, or act as if they forget, that they are to tell not only the truth but the whole truth, and think if they don't tell a lie affirmatively they may negatively suppress the truth. It is this feeling of opposition to the cross-examiner, this state of mind of 'contrary flexure' with which the cross-examiner has to deal, in addition to the accompanying sense of partisanship." Cross-examination is a job requiring a clear head,

good judgment, an understanding of human nature, infinite patience and an imperturbable good temper; but it has great rewards.

PREPARATION AS AN AID TO CROSS-EXAMINATION

With our conception of a trial as an earnest endeavor to arrive at the truth and the justice of a controversy comes the realization that the preparation of a lawsuit is the most important factor in its outcome. It is axiomatic that a case well prepared is more than half tried. It would be well to begin with your own client and his witnesses. As Thomas Fuller so quaintly but pertinently put it in the language of his day, the lawyer "not only hears but examines his clients and pinches the cause when he fears it is foundred. For many clients in telling their case rather plead than relate it, so that the advocate hears not the true state of facts till opened by the adverse party." Resort to pre-trial practice is a great help: the bill of particulars, examination before trial, discovery and inspection, demand for admissions.

In addition to making himself thoroughly familiar with his own case, the lawyer should try to anticipate the case he will have to meet. He can often ascertain who some of the witnesses are that are likely to be called by the other side and to what they may be expected to testify. He can plan, in a general way, the lines on which he will conduct their cross-examination and endeavor to collect as much information as possible that may be of assistance in that connection. Above all, the lawyer in preparing for trial searches for any writing tending to establish his case for, as one very able judge said, perhaps going to an extreme: "The smallest slip of paper is sooner to be trusted for truth than the strongest and most retentive memory ever bestowed on mortal man."

The lawyer then should be fully prepared on the facts and on the law. For he must know the law if he is to appraise the significance of the facts testified to or omitted by the witnesses. Baron Wilde had a motto which every lawyer might well make

his own. "I never," said he, "despise any opponent so as to become careless; I never fear any so as to become unnerved."

Cross-examination, therefore, depends in large measure for its success on the supply of materials which the examiner has at hand. Most of those materials he gets as the result of careful, painstaking, thorough preparation before trial. The lawyer who waits to pick up things as they develop at the trial makes a big mistake. Effective cross-examination is not the result of chance or of the happy inspiration of the moment (although such things do at times happen). If a lawyer is not complete master of the facts and of the law in a case, it is difficult for him to evaluate the testimony as it is unfolded or to be self-possessed and ready to shift his position without embarrassment when things take an unexpected turn. If success on the battlefield goes to the side with the greatest reserves, success on the trial generally goes to the side which has the most useful material acquired through adequate preparation.

This process of preparation continues all through the trial. The case keeps evolving all the time; new problems arise; old problems reshape themselves and careful checking is required. You must always be watchful and on the alert to look for the weak, the vulnerable spot in your opponent's case and in the testimony given by his witnesses. No matter how complicated a case, it can always be resolved into a comparatively few vital points which are never lost sight of by the skilful lawyer.

I find no objection, in fact, it is helpful for a lawyer as he prepares his case, to jot down headings indicating suggestions for cross-examination; otherwise in the heat of a trial some points might be overlooked. That in no way destroys the spontaneity or the appearance of freshness of the examination. It is something different from the unwise practice, save in exceptional instances, of preparing questions for cross-examination which are read to a witness. While on the subject of making a note of suggestions for cross-examination attention should be called to the fact that lawyers, at times, forget the rule requiring the laying of a proper foundation for impeaching the credibility of an opposing witness

(other than a party) by evidence of prior contradictory or inconsistent statements. That neglect has serious consequences (Larkin v. Nassau Electric R. R. Co., 205 N.Y. 267).

The lawyer who comes into court should be so familiar with the rules of evidence as not to require the exercise of deliberation in dealing with them. Any unusual rule of evidence likely to come up should be carefully briefed. Finally, on this phase of the subject, I have seen many cross-examinations ruined because attorneys conducting them kept frantically searching for papers which should have been methodically arranged, ready for use the moment they were needed. If you allow your papers to be in a state of confusion, you will soon be in a muddle yourself.

FAIRNESS AND ACCURACY

If there is one unvarying rule which permits of no exception or deviation it is this: Be fair in your cross-examination—bold, firm and persistent, but fair. The bullying and shouting at witnesses on cross-examination is largely a thing of the past. We have learned, as Bentham observed over a century ago, that "browbeating is that sort of offense which can never be committed by any advocate who has not the judge for an accomplice." There is nothing more distasteful to a jury than the hectoring of a witness. Always conduct your cross-examination in a manner so as to give the impression that your purpose is not to confuse or to trap a witness but to ascertain the truth and to expose falsity or inaccuracy. The savage, surly style of cross-examination is outmoded. The most effective cross-examiner is, for the most part, quiet and conversational. Certainly in a non-jury trial, the histrionic style of cross-examination should be avoided. How often the judge has to remind the lawyer that there is no jury present. Affected mannerisms and gestures are distracting. A calm, dignified earnestness and naturalness invite respect and confidence.

I have heard it summed up thus by a judge of long experience: "The most deadly cross-examination is invariably the most courteous. It can damage the witness beyond repair or destroy him

without awakening the sympathy that will suggest excuses for him. You will lead far more witnesses to destruction than you will ever drive."

One of the worst mistakes a cross-examiner can make is to distort, in his questions on cross-examination, any answers given by a witness or to misquote the testimony. If this offense is repeated the jury will become critical not only of the examiner personally but will regard his entire case with distrust and suspicion. When on your opponent's objection the testimony is read back and supports his objection, not only is the witness strengthened but great harm is done to your case.

Above all, never lose your temper with a witness. Join in the laughter when it is against you and do not appear to be disconcerted by any answer no matter how harmful to your case. Ridicule is a two-edged weapon to be used with great care. Counsel do not always remember that if they show themselves too clever as compared with a witness, the jury, or even the judge, may make allowances and extend more sympathy to the witness than would otherwise have been the case. It should always be kept in mind that the purpose of cross-examination is to help the client win his case, not to display the virtuosity of his lawyer.

Much tact is required in dealing with a talkative witness. On the one hand it is dangerous to let a witness talk beyond the requirements of a direct answer to a question. On the other hand it is unwise to give the jury the impression that you are bottling up the witness. Very often a clever, unscrupulous witness will try to get in incompetent and damaging matter if he is not stopped. On such a witness a tight rein must be held. The cross-examiner must be on the alert to distinguish between the harmless rambler and the dangerous type who will interpolate matter ruled out as incompetent on the direct. Even if such matter is stricken out and the jury told to disregard it, a prejudicial impression may remain. In dealing with a witness who is of the harmless talking and explaining type, it is often wise to let him talk, for a while at least, but to repeat the question if it is one which properly calls for a "yes" or "no" answer.

On encountering such a witness, I have seen expert cross-examiners turn to the jury with a gesture at once helpless and appealing as if to ask mutely how with a witness like that they could ever hope to get anywhere, or with that "you see the kind of difficulty I am in" glance. I read the record in the recent Harold Laski libel action and noticed how skillfully Sir Patrick Hastings dealt with the long, explanatory answers given by Laski on cross-examination: few interruptions but always the admonition "try and make your answers short; try to answer 'yes' or 'no,' if you can;" "then by your answer you mean to say 'no' to my question." And so forth. In some instances long explanatory answers may furnish a good deal of ammunition for further cross-examination. They certainly did in the Laski case.

Be a little cautious when you cross-examine as to character. Make sure that such questions are not only relevant but essential. Generally speaking, it is a blunder to put cruel questions or to rake up old stories. Nothing is more obnoxious to a jury. It is appropriate, for example, where the truth of what a witness has said is in issue, to ask whether that witness has ever been convicted of a commercial fraud but there certainly can be no justification for attempting to question the truthfulness of a witness by asking her whether she did not give birth to a child out of wedlock. Yet it is reported that Lord Birkenhead when at the Bar did just that and was severely reprimanded for it by the justice presiding.

The rule that when credibility is involved the jury is entitled to know the antecedents of the witness, is not without its limitations. I have in mind, for instance, the story of the witness who was asked as to a conviction years gone by although the honesty of the witness was really not in issue. Chief Baron Pollock, who presided at the trial, said that he burst into tears at the answer of the witness. A person, who by his cross-examination, gives unnecessary pain to a witness is either a fool or a brute, a brute to give the pain and a fool not to see the prejudice to his client.

When you deal with a knave, however, it is not only your right but your duty to go into his past life. But you must be sure that you know what you are doing. Before you ask a witness whether

he has ever been convicted of a crime, you should have in your possession a certified copy of the conviction and proof that the person named in the certificate is, in fact, the person being questioned. I have heard lawyers ask a witness recklessly and without knowing the fact, whether he had ever been convicted of a crime. The indignant answer in the negative spelled the doom of the cross-examiner's case. When you have decided to ask a witness about a prior conviction for a crime, it is better not to do it in such a way as to indicate to the witness that you know his past record. If he falsifies about it, his lying on the stand may be even more significant than his prior conviction. Attack on the character of a witness is a powerful weapon to be used courageously but cautiously.

The fairest cross-examination then is the most effective with the triers of the facts and with the judges on appeal. Fairness in cross-examining is not synonymous with timidity or weakness; quite the contrary. Remember, the jury is generally on the side of the witness. They resent it when he is treated unfairly. Some of the jurors have been witnesses themselves and have undergone the ordeal of cross-examination.

PLANNING THE CROSS-EXAMINATION

As has been indicated, thoroughness in preparation will enable you to outline some of the cross-examination in advance of the trial and will furnish you with much ammunition as the trial progresses. It will give you a feeling of security and of confidence as you proceed with your case. While the witness is being examined on the direct, you will be studying him and considering what kind of person you have to deal with; you will consider the demeanor of the witness; his manner of testifying; his glances; his hesitancies; the change in the tone of his voice; his reservations in answering. You will size up the witness and, if you determine to cross-examine him, will decide quickly on your method of approach. Here is where the skill of the cross-examiner counts for most: his judgment of men, his insight into human nature.

These things, for the most part, you cannot learn from books. Attempts have been made to describe the different types of witnesses and how they should be dealt with. But human nature does not readily yield to definition. All kinds of persons may be witnesses and each witness presents his own peculiar problem. The cross-examiner must develop a capacity for evaluation of human beings. He must use his professional experience to read personality through the camouflage of looks. He will make mistakes, of course, but he will learn by the process of trial and error. He will acquire the ability to get inside the other man's mind, to place himself in the other man's position.

As the witness is testifying on direct examination, I see no objection to your making notes to assist you in your cross-examination. Obviously, a knowledge of some system of shorthand is a considerable advantage. Others incline to the view that note-taking is distracting and that entire attention should be focused on the witness. An occasional glance at the jury to see how they are taking the testimony of the witness is helpful.

"TO WHAT END—TO WHAT END?"

If you have prepared your case thoroughly on the facts and on the law, you should not find it difficult to determine whether you really want to cross-examine a witness. Some lawyers think that every witness should be cross-examined. Perhaps they feel that way because otherwise their clients might be disappointed. Such an attitude on the part of lawyers is a great mistake and often disastrous. Has the witness really testified to anything harmful? Has he omitted something you know you can get from him that will be helpful?

To what end—to what end? That is the question every lawyer should ask before he decides whether he will cross-examine at all. After considering the possibilities I have indicated and others along the same line, the lawyer who then says "No questions" takes a bold, courageous and wise step. But this step should never be taken in consequence of timidity. Don't cross-examine if you

conclude there is nothing to cross-examine about, but be very sure about that before you wave the witness away. Not to cross-examine when any witness has testified adversely to you on a crucial, vital point of the case is to court defeat.

Many of you will remember the scene in Alice in Wonderland when the Duchess' cook was called as a witness in the case of the stolen tarts.

"Give your evidence," said the King. "Shan't" said the cook. The King looked anxiously at the White Rabbit who said in a low voice: "Your Majesty must cross-examine *this* witness." "Well, if I must, I must," said the King with a melancholy air, and, after folding his arms and frowning at the cook till his eyes were nearly out of sight, he said in a deep voice "What are tarts made of?" "Pepper, mostly" said the cook. Then there was a diversion in the court and in the meantime the cook had disappeared. "Never mind" said the King, with an air of great relief. "Call the next witness." And he added in an undertone to the Queen, "Really, my dear, *you* must cross-examine the next witness. It quite makes my forehead ache."

Having decided to cross-examine, proceed with an air of confidence and assurance. I have seen so many lawyers get on their feet, wishing that the system of cross-examination had never been invented, with an air of hesitancy, almost of despondency, fumbling with their papers, acting listlessly as if they were dazed and giving the decided impression (and it gets to the witness and to the jury very quickly) that the examiner has not the remotest idea of what he is going to question the witness about. Some lawyers have a habit, when they cross-examine, of gazing at the ceiling or at the windows, with a kind of far away look, as if searching for some inspiration. The jury is watching and following you. Give the appearance of being keen and vigilant, seemingly never for a moment in perplexity or doubt. Be alert in demeanor or the jury will droop with you.

You decide then in your mind what you seek to accomplish by your cross-examination. Do you wish to impair the credit of the witness? If so, do so at the outset of the examination. Soften

him up at the beginning and then go on with the examination directly relating to the particular issues. If you impair the credit of the witness, he will be in a chastened mood, not knowing what other information you may have with which to afflict him.

If you can get off to a good start with the right question on your cross-examination, you have a great advantage. In the famous Seddon case which you will find reported in the British Notable Trials Series, Frederick Seddon and his wife were charged with murder of their lodger, Miss Barrow, by administering arsenic to her. It was commonly thought that if Seddon had not taken the stand in his own behalf the evidence adduced on behalf of the prosecution would have been insufficient to convict. As it was, the case aroused a great deal of discussion in legal circles in England. Seddon was convicted and paid the full penalty. His wife was acquitted. Seddon was represented by Marshall-Hall. The prosecution was represented by the Attorney General, Sir Rufus Isaacs, afterwards Lord Reading. Sir Rufus commenced his cross-examination of Seddon with the following questions:

Q. Miss Barrow lived with you from 26 July 1910 until the morning of 14 September 1911 (when she died)?

A. Yes.

Q. Did you like her?

Seddon replied, evidently completely upset by the question:

A. Did I like her?

Q. Yes, that is the question.

A. She was not a woman you could be in love with but I deeply sympathized with her.

The effect created by this question and answer was indescribable. Incidentally, it is worthy of note that whenever a witness is embarrassed or upset by a question he has a tendency to repeat it.

An aimless, reckless cross-examination, a fishing excursion, is not only ineffective, but harmful and sometimes fatal. You may blindly ask a question which counsel for the other side did not dare ask on the direct and with devastating results. You may thoughtlessly ask the one question which will supply a vital omis-

sion in your opponent's case. No one but the most experienced should resort to the so-called exploratory cross-examination. Every case can be resolved into a few significant, crucial issues. Your cross-examination should be aimed at those (not directly, of course) but towards them and always with the essentials of the case in mind. Effective cross-examination is not a haphazard process; quite the contrary; it has a plan, a purpose. Occasionally without intending it and quite by accident, you will hit the bull's eye; more frequently, however, as you proceed aimlessly, something will hit you that will shake you to the very marrow of your bones.

Most cross-examinations are entirely too long. A long and rambling cross-examination of each witness in turn wearies the court and jury who are likely to lose interest in your questions and in your case. Moreover, the more extended your cross-examination, the wider the scope will be for re-direct examination. Moderation, it has been said, "is the silken thread that runs through the pearl chain of all the virtues." Bear that in mind when you cross-examine.

Never, never, never, we are told, ask questions when you do not know what the answers will be. Well, that is a counsel of perfection and it is not always feasible to follow it. An experienced lawyer has put it this way: "The real art is never to ask a question unless you know the answer beforehand. Sometimes you have to take a chance but even then it is often possible by careful approach to get an idea of the answer before the question is asked and it may even happen that you decide after all to move to another line of inquiry."

You must have a sense of proportion as you proceed with your cross-questioning. A discrepancy here and there does not impress a jury unfavorably. On the contrary, it often lends an air of verisimilitude to the story told by the witness. But if you develop a series of inaccuracies, even as to unimportant matters, you may succeed in convincing the jury of the unreliability of the witness. It is effective likewise if you get the witness to exaggerate to the point of showing a definite bias; or to indicate that he would de-

liberately or even carelessly testify to almost anything; or that he will admit nothing that you put to him. But care must be taken lest you make yourself the victim of the attempted exaggeration.

As you proceed with your cross-examination you should never relax your observation of the witness. Watch the way he reacts to your questions. Some say that a convulsive twitching of the muscles of the mouth will often betray agitation which the witness wants to conceal. There is no interrogatory so effective as that which is put by a steady, searching eye. Cross-examination may be regarded as a mental duel between witness and examiner and the examiner who takes his eyes from the witness is likely to be worsted as the swordsman who lets his eyes wander from his adversary. In a word, the skillful cross-examiner is one whose antennae are always aquiver and sensitive to the slightest reaction of the witness. The cross-examiner should not be interrupted in his line of cross-examination by whispered suggestions from his assistant or his client, nor should he be disturbed by sleeve pulling to attract his attention. Even the most experienced examiner can be thrown off balance and the examination itself marred by such annoyances. Suggestions for questions during the progress of the examination should be noted on slips of paper placed on the table and the examiner may pick them up whenever he wishes.

KNOWING WHEN TO STOP—THE ONE QUESTION TOO MANY

The most striking fault observed in cross-examination (and we who sit on the Bench are in a position to know this more than the active participants) is not knowing when to stop. That superfluous question; that one question too many! How often an otherwise good cross-examination has been wrecked by it! If you have driven the nail in deep enough, it is generally fatal to keep on hammering at it. Time and again we find questions put that elicit vital answers supplying the deficiencies of the direct exam-

ination. Time and again the cross-examiner is not satisfied with the damaging answer he has obtained but keeps on and asks the one question too many that turns the tide completely against him. Some of the ablest cross-examiners are guilty of this lapse.

The classic example of not knowing when to stop is found in the celebrated libel suit of Whistler v. Ruskin. One of Whistler's so-called "nocturnes" had been placed on public exhibition. It was called "Falling Rocket at Cremorne Gardens." I saw it in one of the art galleries here last year and confess that it puzzled me somewhat. It aroused the ire of Ruskin who wrote:

> I have seen and heard much of Cockney impudence before now, but never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face.

Whistler sued Ruskin for libel. He was represented by Serjeant Parry and Ruskin by the Attorney General, Sir John Holker, both pre-eminent at the Bar. In cross-examination, Sir John asked Whistler how long it took him to knock off "that nocturne." Whistler replied "As I remember, a day * * * I may still have put a few touches to it the next day if the painting were not dry. I had better say that I was two days at work on it." Now, the Attorney General could have stopped there and he could have inquired whether Whistler asked 200 guineas for the painting. That would have been good, orthodox cross-examination. Instead of that he said: "Oh, two days! The labor of two days, then is that for which you ask 200 guineas?" Whistler had Sir John where he wanted him. Like a flash, he replied "No, I ask it for the knowledge of a lifetime." It was "a crushing reply to a fellow man of art who was sitting with a hundred guinea brief in front of him 'knocking off' a day's work."

But Holker was a bear for punishment. He asked Whistler "Do you think you could make *me* see the beauty of that picture?" Whistler gazed at the picture and at the Attorney General attentively several times, scanning his face carefully. At the end of a long silence he said gravely: "I fear it would be as hopeless as for

a musician to pour his notes into the ear of a deaf man." It is never safe to taunt a polecat and it is risky business to ask a hostile witness a question unless sure there is not a morass under it.

With experience you will learn to stop when the last answer of a witness is so framed as in itself to be a danger signal. The advice of an expert cross-examiner is "not to make the common mistake of putting one question too many in order to emphasize a good point. If you try to get a more emphatic answer, you may find the witness has had time to think and you will get an answer that will destroy all the good you have achieved." Always try to stop in your cross-examination on a note of triumph. Once you have obtained an admission from a witness which effectively establishes your position on one of the essentials of the case, stop the cross-examination of that witness. Try your luck on other points with other witnesses called by your adversary.

Lord Simon, who was one of the most successful of English barristers, says in his advice to lawyers about cross-examination: "Lastly, don't overcook your goose, i.e., if you get a useful admission, keep it in cold storage for your final speech and don't try to get it repeated—or you may lose it altogether." This is a fundamental principle expressed in striking language. It should never be lost sight of.

In cross-examination, as in other steps in the trial of a case, those counsel who have learned the art of compression are the most successful. Don't cross-examine on everything unimportant or trivial; use a sense of proportion and of moderation. It is in this "segregation of the relevant from a tempting superfluity of information" that a cross-examiner shows himself to be a master of his art. Lord Maugham puts it thus:

> In a case with masses of material, one of the chief duties of counsel is to select and discriminate. I have known cases where a skilled advocate having materials which might have provided for a week's cross-examination of a party to the suit has put some pertinent questions for half an hour and then sat down content to know that neither judge nor jury could put any faith in the witness' answer as against the independent evidence of the other side.

KNOWING WHEN NOT TO STOP

Reference has been made to the one question too many; to the importance of knowing when to stop. I should like to refer for a moment to the converse, to the importance of knowing when not to stop. This applies, for example, when you have a writing signed by a witness. Never refer to it, and certainly do not offer it in evidence, until the witness has committed himself, fully and unequivocally, to some relevant statement which is clearly at variance with that contained in the writing. Do not rest with any half statement or ambiguity he can explain away later. In other words, do not let the nail hang loosely; drive it home before the witness is confronted with the document.

CROSS-EXAMINATION IS NOT REPETITION

Another common fault is the failure to realize that cross-examination is not the repetition of the story told by witness on the direct. Occasionally, with a child especially, repetition demonstrates that the witness has been coached and is telling a rehearsed story. Generally however, it is ineffective and even harmful. It is axiomatic that you should avoid having a thing harmful to you stated twice by a witness. By having the witness repeat his testimony, you fix it in the minds of the jury and run the risk of the mention of some fresh point that had previously not been gone into. Sir James Scarlett, who later became Lord Chancellor Abinger, and who was one of the outstanding advocates of his day, said of a lawyer that his idea of cross-examination was putting over again every question asked in chief in an angry tone. All that accomplishes is that the witness only repeats his story in stronger language to the jury.

FORM OF QUESTIONS

The rules of evidence relating to cross-examination are so few and so simple that they need not detain us in this lecture. The

shorter the questions on cross-examination the better. Generally, you should be slow to object to questions put on cross-examination unless they are clearly harmful. Sometimes, I regret to say, improper questions are asked for the very purpose of inviting an objection on the theory that the jury would get the impression you were trying to conceal something. As to the form of the questions, reference will be made to six typical examples:

1. The most risky question to ask on cross-examination begins with "why" or "how." Generally, the witness tells the examiner: to his consternation. Such questions open the way to long explanations and should only be asked if the examiner is certain that any explanation that can possibly be given, can be demonstrated by him to be untenable, or that whatever answer the witness gives is bound to hurt the side for whom he is testifying. Otherwise, to take a chance with such a question is warranted only as a last resort in a desperate situation. Yet I have heard it asked time and again without any realization on the part of the cross-examiner, until it was too late, of what he was bringing down upon his head.

2. The most inadvisable question to ask is: "Isn't it a fact that such and such is the case?" Does the examiner really believe that the witness will admit it in contradiction of the story he has told? Of course, the witness will say "no." The question is rarely advisable and serves a harmful rather than a useful purpose and should only be put at the point where an affirmative answer by the witness is inescapable.

3. The most useless question to ask, as a routine matter, is: "Do you realize you are under oath?" The answer is generally given with an emphasis that is most disconcerting.

4. The question most improper in form and strangely enough so frequently used is: "If I were to tell you that such and such is the case, what would you then say?" This type of question is properly objected to.

5. Another type of question which is most improper is that which embodies a number of separate questions in one—a sort of composite question.

6. So many times lawyers fail to frame their questions properly

when asking about testimony given by the witness at a former trial or on an examination before trial. The proper form is so simple! "On your examination before trial, at p—, were you asked the following question and did you give the following answer: question . . .; answer . . .?"

At this point it may be observed that to ask a witness on cross-examination whether he made a written statement to anyone is a risky question; yet I have heard it put so often and so thoughtlessly. If the answer is in the affirmative, the statement is frequently tendered to the examiner by the other side which generously, albeit gratuitously, offers to put it in evidence. Sometimes the examiner does not even want to look at it; he acts as though he would rather handle a rattlesnake; he is put in the dilemma as to whether he should offer the statement in evidence or give the jury the impression that the statement corroborates the testimony of the witness. The question should not be asked unless (a) the examiner in some way has ascertained what is in the statement, or (b) all other efforts to break down the testimony of the witness have failed and it is essential to break down that testimony in order to win or (c) the examiner is willing to offer or have the other side offer the written statement in evidence regardless of its contents.

This is different from the situation where the witness on direct examination has refreshed his recollection from a paper; that paper may not be put in evidence by the party whose witness so used it. Before cross-examining the witness, opposing counsel should demand to see the paper. He has this right and should always exercise it. He is not required to offer the paper in evidence as a condition of examining it. But oh, how revealing and damaging some of those papers used to refresh recollection can be in the hands of a good cross-examiner! The latter may, if he wishes, offer the paper in evidence as tending to show that the recollection of the witness could not have been refreshed by it or that the so-called refreshed recollection of the witness is at variance with the contents of the paper.

EXPERT TESTIMONY

There are almost as many types of experts as there are lay witnesses and your style of cross-examination has to be adapted to the kind of expert witness you are examining. Generally speaking, you cannot hope to cross-examine an expert successfully unless, in preparing for trial, you have made yourself reasonably expert on the subject under inquiry. You will be courting failure if you rely for your cross-examination on fortuitous circumstance. Let me give you a concrete example.

An expert, either because he is ignorant, or from motives not altogether worthy, testifies that a negative x-ray eliminates the existence of a fracture at the base of the skull. How are you going to cross-examine that doctor successfully unless, as the result of your preparatory study of the medical authorities and consultation with your own expert, you learn that clinical symptoms may demonstrate the presence of fracture at the base of the skull although the x-rays are negative. True, you may have your own expert alongside of you to prompt you, but while that is better than nothing, such a procedure greatly detracts from the spontaneity of your examination and from its effect. I have, of course, selected the simplest example, but it is typical of multitudes of others which are much more complicated.

Moreover, it frequently happens that if you have prepared yourself by a study of the medical authorities on the subject you can make most effective use of them, as you have a right to do, on your cross-examination. Ask the witness if X's book on surgery is a textbook of recognized authority in the profession. Sometimes the witness will even "admit" that he is familiar with it. Then confront him with the text which is antagonistic to his expressed opinion. Preparation—that's what counts.

What you seek to accomplish by the cross-examination of an expert is that he has expressed an erroneous or incomplete opinion; that he is partisan or overzealous; that he is given to extravagant and reckless statement; or that he is not especially qualified

by training and experience to express a worthwhile opinion on the question under inquiry. You try to show the invalidity or at least the uncertainty of his conclusions.

Generally, the expert is asked to express his opinion on the basis of a hypothetical question, often voluminous to the point of absurdity. Do not make the mistake of objecting that the question is improper in form. Let it go unless you want to enlist the sympathy of the jury for your opponent and sometimes the aid of the court in enabling him to reframe his question properly. Do not give the jury the impression that you are indulging in technical, obstructive tactics.

Listen carefully to the hypothetical question put to the expert on direct examination. Note the incorrectness of any assumption on the basis of which the expert is asked to express his opinion. Note also the failure to include pertinent facts favorable to your side. Instead of objecting to the question and pointing out the erroneous or incomplete assumptions, I have always thought that, as a general rule, although there is a difference of opinion on this point, it is much more effective to leave those matters for cross-examination. It avoids the long wrangling over the hypothetical question which is apt to prejudice the jury. You then start by asking the expert whether his answer is based on the facts assumed in the hypothetical question. He will generally say that it is. When you knock out or weaken the props which support the expert's opinion, it must fall or its strength be greatly impaired.

Do not cross-examine about the expert's qualifications unless you know that his experience has been limited in the field in which he is testifying. Nor is it wise to ask the expert on cross-examination to give reasons for his opinion, unless you are quite sure you can demolish any reasons he can give. Sometimes lawyers on direct examination will omit or limit such questions, in the hope, often realized, that opposing counsel on cross-examination will inquire into such matters. The theory is that a jury is more impressed if a witness establishes his authority in the hostile

atmosphere of cross-examination than if he does so at the instance of counsel who called him.

In planning your cross-examination you have to consider whether a doctor who is testifying has treated the patient, or whether he is called solely as an expert. You have to consider also whether he is what is called a "professional expert." You generally know before the trial who treated the plaintiff or who examined on behalf of the defendant. It should not be difficult to ascertain the standing of those doctors at any rate. You have the right to ask how much the expert is receiving for his testimony, how often he testifies as an expert and for what side.

Above all, no matter how great the provocation, always be fair with the expert and treat him with courtesy. Do not, except when the situation clearly demands, insist upon "yes" or "no" answers from experts. That smacks of unfairness and is resented by the jury who feel, even more than in the case of lay witnesses, that an expert should not be bottled up when he gives his testimony. Moreover, such witnesses, who often know their rights, will appeal pathetically to the court for permission to avoid a "yes" or "no" answer and it will hardly help you if the court accords that permission.

However, you should never allow any expert to evade a pertinent question on cross-examination. Particularly in dealing with professional experts, it is often advisable to halt a general dissertation or lecture, the effect of which may mislead the jury into the belief that what are merely generalizations have some application to the particular case. Even here we cannot be dogmatic. Sometimes the expert, in consequence of his lecture, can be completely discredited by a competent cross-examiner.

Of course, there are occasions when an element of dry humor is permissible. If a doctor is so pompous that he testifies he found, on examining the patient, considerable ecchymosis under the left orbit by extravasation of blood under the cuticle, it does no harm to ask that expert: "I suppose you mean the man had a black eye?"

EXCLUSION OF WITNESSES

At the opening of a trial, when you have reason to believe that a succession of adverse witnesses will be called to testify to the same occurrence, you should consider the advisability of moving to have all witnesses excluded from the court room until they are called to testify. Whether or not you should resort to this procedure depends on the nature of the case and on the character of the witnesses on both sides. It is rarely resorted to in civil actions by expert cross-examiners. Sometimes by excluding witnesses you may be able to show that their story was rehearsed if you can get a number of witnesses to testify to the same facts in identical language; or you may succeed in showing them to be unreliable if there are vital discrepancies in their account of the same happening. The exclusion of witnesses has its origin perhaps in the history of Susanna, which is to be found in the Apocrypha. There it is related, with dramatic force, how Susanna was vindicated from a false charge of adultery when the prophet Daniel, in cross-examining her accusers, resorted to the method of excluding witnesses.

CONCLUSION

In conclusion, let me make two observations. First, I do not minimize the importance of cross-examination. Sometimes the entire case turns on it. Generally speaking, however, experience has led me to conclude that, in civil cases, cross-examination is but one in a number of equally, if not more, important steps in a trial. The strength of your direct case (and there are notable exceptions of course) is more important than cross-examination. In criminal cases, for obvious reasons, the contrary may be true particularly as concerns a defendant. He has to rely mainly on the demonstrated weakness of the prosecution's case. That is why so many of the ablest lawyers and most experienced judges hold that in civil cases the ideal situation is to have a strong direct case and be obliged to resort as little as possible to cross-examination.

Now, for my second and final observation. There are certain fundamental principles which it is helpful to keep in mind. The great difficulty is not simply to know those principles but to understand their practical application to varying situations.

It has been said that "it is not safe to use the words 'always' and 'never' about that unconscionable creature the salmon." However, the good salmon fisherman knows that in the pursuit of his objective there are certain things to do and certain things not to do. True, there are times when in order to land his fish the rules have to be modified or even discarded. So it is with cross-examination. It is rarely safe to use the words "always" and "never" in dealing with that unpredictable and strangely elusive phenomenon—human nature. It is helpful to know the general principles or rules but as with salmon fishing so too with cross-examination, it may sometimes be advisable, even necessary, to throw the rules overboard in order to land your fish.

Committee Reports

COMMITTEE ON MEDICAL JURISPRUDENCE

REPORT ON MEDICO-LEGAL PROBLEMS OF ALCOHOLISM

By LYMAN C. DURYEA, M.D.

Medical Director, The Research Council on Problems of Alcohol

The study of alcoholism has produced considerable specialized knowledge concerning this disease yet curiously it is not the medical profession, but the magistrates who determine the disposition of this army of patients. And wardens and jailers, not the doctors, are responsible for the treatment of these individuals. The tragic results of this anomalous situation may be witnessed any day in the courts of this nation and in our jails. There is no evidence that excessive drinking has been diminished by the punitive approach to a solution of this problem. As a disease of our society, it is scarcely manageable within the existing framework of our courts and jails and requires coordinated action.

In the growing recognition of alcoholism as a disease rather than as a crime to be punished by a jail sentence or a fine, to be neglected, or accepted as one of the sad facts of life, it has become evident that need exists for reconsideration of present laws, and statutes pertaining to the alcoholic and the methods of handling him and the many problems he introduces into his family life and into the community and state. Laws governing alcoholics vary widely. Few of them give practical consideration to the alcoholic individual and his condition or to the effect of alcoholism on the community or state and most of them are punitive in nature with resultant community harm, economically and socially. There is no resource in a community other than the hospital and its clinics suitable for the management of patients who for one reason or another have come under the domination of alcohol, a drug which is so potent at times that it can actually alter

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Editor's Note: At the request of the Association's Committee on Medical Jurisprudence Dr. Duryea has prepared this study of the legal problems involved in the control of alcoholism, a subject which the Committee has under study at the present time. It is planned that the Committee will present a report to the Association at a later date. The Research Council on Problems of Alcohol is an associated society of The American Association for the Advancement of Science. The President of the Council is the distinguished Professor Emeritus of Physiology at the University of Chicago, Anton J. Carlson.

the course of civilization. Yet there are no legal provisions requiring that such patients be sent to hospitals for treatment and possible rehabilitation. Instead those of these people who come before our courts are frequently sent to jail where they receive no treatment, are often neglected and abused and from whence they are discharged eventually and to which they are eventually returned again and again with resultant harm to the individual and to the community.

What should be the policy in relation to arresting for drunkenness? What plans can be established for the referral of alcoholics to hospitals for treatment rather than to jails as punishment? What new laws are required to make this possible?

Recognizing the fact that chronic alcoholism is an illness, it is considered inadvisable to center the care of alcoholics in correctional institutions where adequate medical facilities do not exist and where the initiation of such facilities would not be in consonance with the precepts on which such correctional institutions were established and are currently operated. It is considered that facilities for the treatment of alcoholics, inasmuch as they are medical patients, should be under medical supervision and in no way related to the correctional department. Medical reports are privileged communications and the alcoholic is a sick person who must be no longer regarded as a criminal.

In general, any legislative measure directed toward attacking the problems of alcoholism, which recognizes alcoholism as a medical problem, and which aims not merely to treat people afflicted with this problem, but also to seek the causes with a view toward prevention is sound. Such a measure connotes not only the establishment of facilities for the adequate diagnosis, treatment and rehabilitation of alcoholics, but also those necessary for research into the causes and means of prevention, and the development of sound measures of differential diagnosis, treatment and rehabilitation.

The legal and medico-legal problems related to alcoholism are so extensive that it is possible to present only a few of them here. Many of our laws pertaining to alcoholics require review and revision from the medical viewpoint.

Any consideration or revision of the law with reference to problem drinking must make a sharp distinction between intoxication *per se* and compulsive drinking. Compulsive drinking or chronic alcoholism once it has been established is considered to be a sickness or disease. The occasional intoxication of non-compulsive drinkers is not considered a sickness. There should be a legal differentiation between these two conditions. There are involved in this consideration insurance benefits, divorce proceedings, and certain criminal acts. The

criminal aspect of alcoholism or intoxication is presently confused.

New laws should be enacted providing facilities and methods for the proper handling, care, treatment, and rehabilitation of alcoholics. A recodification of laws may be necessary pertaining to the medico-legal aspects of problem drinking, placing problem drinkers under the jurisdiction of health rather than penal authorities. Laws should state that the alcoholic is a sick person in need of medical care, advisory and rehabilitative services. The term "chronic alcoholic" should be defined in terms of its medical connotations rather than its punitive connotation. There should be a re-definition of the term "public intoxication," "habitual drunkard," and "common drunk" as related to vagrancy, disorderly conduct, etc.

The question of the commitment of alcoholics or suspended sentence or probation for the purpose of providing a suitable and adequate period of treatment should be defined.

Provisions are required to be made for the treatment of persons unable or unwilling to accept treatment, or who are unable to contribute to the cost of such treatment.

Methods need to be established for providing treatment for the large number of court cases in lieu of the present procedures of arresting them, committing them to jail and releasing them. Plans are required to be worked out for the development of standards for the handling by the police and the courts of the various types of inebriety. Minimum procedure should be a prompt physical examination of those arrested prior to appearance at court.

The seriousness of the problem would seem to indicate the need of provisions that judges before imposing sentence cause inquiry to be made as to whether or not the excessive use of alcoholic beverages contributed to the committing of a crime; and of provisions that medical determination be made of the existence of alcoholism for purposes of judicial disposition of the person, and of investigation of the circumstances surrounding the individual arrested for drunkenness or in which drunkenness is a component, in order that underlying causes may be determined and intelligent recommendations be made regarding each individual by the court. Under the present set-up, this does not appear to be feasible. Thus new procedures require to be established. Consideration should be given to the practicability of providing psychiatric court examinations, social follow-up, and pre-trial examination to determine the type of alcoholism and the possible presence of other intercurrent illnesses or injuries.

It is practicable to consider establishing within the structure of the courts of special alcoholic parts to make possible the intelligent

handling of the large number of alcoholics now appearing before the courts and crowding the jails.

Is it practicable to provide treatment facilities for chronic alcoholics in jails? The consensus seems to be that it is not. Correctional institutions were not conceived as chronic disease hospitals and such a plan would make provision for but a part of the problem and would preclude the treatment of those who desire to obtain treatment on a voluntary basis.

Should not alcoholism, acute or chronic, be considered legally on a par with acute and chronic poisoning due to other substances?

Should boards of inebriety be established by law in cities or states to coordinate procedures for the care of alcoholics?

Can laws be enacted requiring that alcoholics be treated and can laws be enacted committing alcoholics for treatment in general hospitals? Should it be required that judges in cases of simply a charge of intoxication place the individual on probation with the requirement that he obtain care at a designated medical center for a definite period of time—a procedure which some courts are following as a permissive procedure in cooperation with interested lay groups?

Is enough known of the existing laws to permit the preparation of model state or local laws and statutes?

What education of the legal profession regarding the medical aspects of alcoholism is necessary and what should be included in the curricula of law schools on this subject?

The legal and medico-legal aspects of the problem of alcoholism cut across every departmental line in the structure of our city and state governments. The functions and responsibilities, the facilities and potential facilities of each require consideration in reframing the laws pertaining to the problem of alcoholism.

COMMITTEE ON INTERNATIONAL LAW

REPORT ON THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT*

The Committee on International Law submits this report in support of the annexed resolution with respect to the so-called Connally Amendment to Senate Resolution 196 of the 79th Congress, 2nd Session, upon which is based the declaration of the President of the

* This report will be presented to the Stated Meeting of the Association on January 20, 1948.

United States recognizing the compulsory jurisdiction of the International Court of Justice. By this Resolution the Association is asked to join in the action taken by the House of Delegates of the A.B.A. at its meeting of February 25, 1947 (See Vol. 33, A.B.A. Journal 249 for text of resolutions adopted by the House of Delegates).

On August 26, 1946, the declaration of the President recognizing the jurisdiction of the Court was deposited with the Secretary General of the United Nations. The declaration recognized the compulsory jurisdiction of the Court as to all legal disputes concerning the matters specified in Article 36 of the Statute of the Court, but contained a proviso with three reservations. Among these was the reservation that the declaration should not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America, as determined by the United States of America;". The concluding wording of the clause quoted, "as determined by the United States of America" is the so-called Connally Amendment which was included in the Resolution by amendment proposed by Senator Connally in the course of the debate on the floor of the Senate.

Senate action recommending the acceptance by the United States of the compulsory jurisdiction of the Court originated by the introduction by Senator Morse in July 1945 of a resolution (Senate Resolution 160) containing the text of the proposed Presidential Declaration. This resolution was revised and later introduced as Senate Resolution 196. Following hearings by a subcommittee of the Committee on Foreign Relations, the Committee on July 25, 1946, recommended favorable action on the resolution (Report No. 1835, 79th Congress, 2nd Session; 92 Cong. Rec., pp. 10850–10853). Although the resolution was reported late in the session, it was brought to the floor by its sponsor, Senator Morse, and following debate in executive session on August 1 and August 2, was adopted with several amendments, including the Connally Amendment, on August 2, 1946, by a vote of 60 to 2.

The resolution as reported by the Committee on Foreign Relations merely contained the proviso that the declaration should not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States." This language followed the formula included in Article 2(7) of the Charter of the United Nations, which denies to the United Nations authority to intervene in matters essentially within the domestic jurisdiction of any state. It was clearly intended by the Senate Committee that the determination of what matters were essentially within domestic jurisdiction would be for the Court, upon application of principles of inter-

national law. The Committee reasoned (Report, *supra*) that if such determination

> "... were left to the decision of each individual state, it would be possible to withhold any case from adjudication on the plea that it is a matter of domestic jurisdiction. It is plainly the intention of the statute that such questions should be decided by the Court, since article 36, paragraph 6 provides: 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'"

The reservation of the right of decision by the United States was, therefore, rejected by the Senate Committee, which further stated

> "that a reservation of the right of decision as to what are matters essentially within domestic jurisdiction would tend to defeat the purposes which it is hoped to achieve by means of the proposed declaration."

The principal proponent of the amendment on the floor of the Senate was Senator Connally. The Senator stated that he was unwilling to make it possible for the Court to determine whether a question of immigration was domestic or international, or whether matters of tariffs or duties, or navigation of the Panama Canal were matters of an international character. The Senator pointed out that of the Court of fifteen, fourteen would be alien judges and concluded that while he was in favor of the United Nations "he was also for the United States of America," and was unwilling to surrender its sovereignty or prestige with respect to any question which might be merely domestic in character (92 Cong. Rec., 10839–10840). Senator Austin stated that while he would rather see the resolution not contain the Connally amendment, he would "for many reasons" vote for it (92 Cong. Rec., 10840). Senator Morse, the sponsor of the resolution, strongly opposed the amendment as being "in effect a political veto on questions of a judicial character" (92 Cong. Rec., 10828). The amendment was adopted by a vote of 51 to 12.

The Connally amendment and its implications were almost immediately subjected to severe criticism. The matter was discussed at the convention of the American Bar Association at Atlantic City in September 1946, and pursuant to action at the Convention the House of Delegates of the Association on February 25, 1947, adopted the resolutions with respect to which this report is submitted (33 A.B.A.J., 249, March, 1947) Senator Morse has reiterated his opposi-

tion in commenting on the significance of the United States' action, but has rather minimized its effect, stating that he did not believe that the United States could or would evade the jurisdiction of the Court by abusing the reservation permitted (32 A.B.A.J., 776, November, 1946). Qualified commentators likewise have been severely critical of the amendment. Professor Manley O. Hudson has stated that the amendment places in jeopardy the great gains made since 1921 in the extension of the jurisdiction of the World Court, concluding that "the world will be fortunate indeed if we have not inaugurated a new and backward movement in this field" (32 A.B.A.J., 832; 897, December, 1946). Professor Lawrence Preuss, of the University of Michigan, principal secretary of the United Nations Conference of Jurists, goes so far as to venture the opinion that the reservation "may legally invalidate the United States declaration, as offending against the principle of the statute that the Court shall have power to decide disputes concerning its own jurisdiction, including questions as to the meaning or effect of reservations" (32 A.B.A.J., 660; 662, October, 1946).

A review of the Congressional history of the resolution and the comment which has been directed at the Connally reservation has convinced the Committee that the Bar should lend its weight to such action as is now appropriate to remedy the situation in which the Senate action has placed our Government, or at least to minimize the harm which the reservation has done or may do. Leaving for the moment the question of what action may be appropriately taken, the principal considerations may be summarized as follows.

The case for the Connally Amendment is not persuasive. Senator Connally's basic fear seems to have been that domestic matters might be trespassed upon by "a predominantly alien court." There is nothing in the record of the Permanent Court which indicated a tendency to encroach upon domestic law (see Hudson, Permanent Court of International Justice, 1920–1942, pp. 476–8). It appears to the Committee rather that the Connally reservation may have been the expression of the traditional isolationism which has shown itself, though not entirely consistently, throughout the history of Senate action on measures calling for the adherence of the United States to international bodies. One can speculate that the vote on the amendment might have been different had the resolution, which was rightly regarded by Senator Morse as a matter of greatest importance, not been up for consideration at the end of a crowded legislative session, when fuller and more deliberate consideration of the amendment might have jeopardized action on the resolution altogether. The debate

shows a certain amount of lukewarm concurrence, which may have been prompted by the desire to save the main body of the resolution.

The case against the amendment is to the Committee more persuasive and in fact compelling. To the lawyer, and without regard to the major political considerations, it seems anomalous and inconsistent that the United States should reserve to itself unilateral decision on an important jurisdictional matter affecting the competence of the Court while purporting to accept the jurisdiction of the Court generally. It may be true, as argued by Senator Morse, that the United States could not in good conscience abuse the reservation. The inconsistency, as a matter of legal substance, however, remains. Again, from the legal standpoint, the limitation upon the jurisdiction of the Court, since reciprocity is the rule in cases before the tribunal, will operate to limit and render uncertain the Court's jurisdiction over the adverse parties in proceedings which may be brought by the United States before the Court. The reservation is accordingly a two-edged instrument which will tend to narrow substantially the Court's jurisdiction. The question has also been raised by Professor Preuss as to whether the declaration as a whole may not be invalidated by the reservation, the argument being that while a state may exclude certain classes of disputes from the jurisdiction of the Court, subject to the provisions of paragraph 6 of article 36 of the Statute, it may not deny to the Court the right granted by the Statute that it shall have power to decide disputes concerning its own jurisdiction. While this would seem to be an extreme point of view, and is one which was not adopted by the very competent committee of the American Bar Association in its report recommending action upon the Bar Association resolutions (33 A.B.A.J. 430; 432, May, 1947) the fact that a question may be raised as to the validity of an instrument of the consequence of the declaration of our Government is at least a makeweight.

However, to the Committee the more important aspects of the question are those based upon broader considerations of policy. It is the announced policy of the United States to support collective action by the United Nations and its organs and the processes by which such action is taken. Particularly in recent months the United States has condemned unilateral action by the USSR in its use of the veto power. It would seem that the position of our Government in supporting collective action through the political agencies of the United Nations would be strengthened if we had not reserved to ourselves the right of unilateral action in an important respect in our relations with its principal judicial organ.

The matter of example and precedent is, it is submitted, also increasingly important. As brought out by Professor Hudson, great progress was made under the optional clause of the Protocol of 1920 in establishing the compulsory jurisdiction of the old Permanent Court. Under this clause the jurisdiction was accepted by most governments without condition, other than reciprocity. This practice continued under the Statute of the World Court prior to 1947. Since the deposit of the declaration of the United States at least two unconditional declarations have been deposited (The Netherlands and China), but it is perhaps a bad sign that the declaration of France, deposited in March, 1947, contained a reservation obviously patterned upon the Connally amendment.

Based upon the foregoing the Committee recommends that the Association adopt the following resolution:

> RESOLVED, that this Association joins in the action taken by the House of Delegates of the American Bar Association at its meeting on February 25, 1947, with respect to the United States Declaration of acceptance of jurisdiction of the International Court of Justice and expresses its satisfaction at the action of the United States in accepting such jurisdiction but urges the withdrawal by the United States, at the first appropriate time, of the so-called Connally Amendment to the Declaration, whereby either the United States or an adverse party, rather than the Court, would determine whether a particular dispute between them is excluded from the Court's jurisdiction because of its connection with matters "essentially within the domestic jurisdiction" of the party so deciding.

Respectfully submitted,

THE COMMITTEE ON INTERNATIONAL LAW
OF THE ASSOCIATION OF THE BAR

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The Library

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SELECTED RECENT ACQUISITIONS JUNE—DECEMBER, 1947

An analysis of the subject matter of the titles added during the past six months, other than continuing serials, shows the many-sided aspects of the library's collection have been kept constantly in mind to serve as the basis for the book selection. The practitioner must have the best treatises, the newest services, the latest periodicals available for quick and easy reference. These are purchased as soon as they are published, provided they are substantial and permanent contributions to the subject with which they deal.

Books on foreign law are usually bought on the recommendation of specialists. European scholars and publishers are beginning to catch up with the legal literature of their jurisdictions. English lawyers are actively writing in their respective fields, now that they have been released from war duties.

"Man does not live by bread alone." Therefore, in the list will be found both the browsing books and those for serious contemplation; philosophy of the law, American diplomatic history, legislative problems, international economics and biographies.

It is hoped that the members will call the attention of the librarian to any monograph or treatise which would be of value to the library.

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